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No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

THE KAHRE-RICHARDES FAMILY FOUNDATION, INC., and THE PANAMERICAN/PANAFRICAN ASSOCIATION, INC., as Successor in Interest to the PANAMERICAN ASSOCIATION FOR THE FESTIVAL OF THE NEW WORLD, INC., ROBERT S. PRITCHARD, Individually and as Chairman, *Petitioners*

v.

THE VILLAGE OF BALDWINSVILLE, NEW YORK, THE COUNTY OF ONONDAGA, JOHN DOE and RICHARD ROE, In Their Capacities as Agents of Onondaga County and the Village of Baldwinsville, ROB ROY POOLS, INC., ROBERT M. WEICHERT and SUSAN M. WEICHERT, In Their Individual Capacities and as Officers of Rob Roy Pools, Inc., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners are two not-for-profit corporations devoted to African-American causes and their Chairman, an African-American. A tax sale certificate to their Baldwinsville, New York real property, then valued at $125,000, was purchased for $303.25 on February 16, 1976 by Rob Roy Pools, Inc., owned by two white citizens of the Village. Although the not-for-profit corporation had paid its real property taxes on December 15, 1976, within the statutory period of redemption, the Village of Baldwinsville transferred the property to Rob Roy Pools, Inc. by tax deed on the grounds the corporation had not paid their 1975 taxes.

Kahre-Richardes, by its Chairman initiated a Real Property Actions and Proceedings Law proceeding in 1980 in the New York State Supreme Court to have the tax deed set aside as void on the ground that the taxes had been paid. A judgment dismissing the Complaint was entered in 1992, although the issue of payment of taxes was never decided in the New York State Court proceedings.

Petitioners filed a Civil Rights Complaint demanding damages for the violation of their Civil and Constitutional rights by public officials acting in concert with private citizens in U.S. District Court on August 18, 1994 alleging the denial of their rights to hold real property equally with white persons. The federal complaint was dismissed on the grounds of res judicata because of the prior New York State Court Judgment. The decision of the Court Below was affirmed by the Second Circuit Court of Appeals.

QUESTION 1

Under the circumstances, did the Court of Appeals err by affirming the judgment of the District Court, granting the motion for summary judgment dismissing this Civil Rights Complaint which sought damages from the public officials acting in concert with private citizens on the grounds of res judicata because of a prior New York State Judgment without applying the transactional analysis approach as would be applied by the courts of New York State, which requires a critical examination of many elements of the prior pleadings and proceedings, in order to assure that the due process rights of litigants were not violated.

QUESTION 2

Whether the affirmance of the judgment of the District Court granting the motion for summary judgment dismissing this Civil Rights Complaint on the grounds of res judicata, where no determination of whether the real property taxes had been paid, which would render void any tax deed, is in conflict with the decisions of the highest court of New York State and has sanctioned such departure by the State Court and by the District Court, so as to call for the exercise of this Court's power of supervision.

QUESTION 3

Does the decision of the Second Circuit affirming the granting of the motion for summary judgment dismissing this Civil Rights Complaint so undermine the confidence of the public to rely upon laws which declare that title to their real

property cannot be divested for the non-payment of real property taxes when the taxes have been paid that it calls for the exercise of this court's power of supervision?

QUESTION 4

Was it error to dismiss the Federal Civil Rights Complaint on the grounds of res judicata where the same set of facts would not sustain both causes of action?

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Second Circuit.

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The April 30, 1996 opinion of the Court of Appeals, Case Number 95-7909, whose judgment is herein sought to be reviewed, is not yet published, and is reprinted in Appendix A to this Petition, pages App. 1-4. The prior opinion of the United States District Court for the Northern District of New York, entered August 17, 1995, Case Number 94-CV-1045, is unpublished, and is reprinted in Appendix B to this Petition, pages App. 5-7. The May 5, 1995 Decision from the Bench of the United States District Court for the Northern District of New York is unpublished and is reprinted in Appendix B to this Petition, Pages App. 9-15.

JURISDICTION

The judgment of the Court of Appeals was entered on April 30, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions from the United States Constitution, which are set forth in Appendix C to this Petition (App. Pages 16-22): United States Constitution, Article IV, Section 1; Amendment I; Amendment V; Amendment XIV, Section 1.

This case involves the following United States Statute: 28 USCS Section 1738 is set forth in Appendix C.

This case involves Federal Civil Rights Acts, 42 U.S.C. 1981, 1982, 1983 and 1988, set forth in Appendix C.

New York State Statutes are involved, which are set forth in Appendix C: Real Property Tax Law Section 1454 (3) and (5); Real Property Tax Law Section 1456 (1) and (3); Real Property Tax Law Section 1464 (1), (2) and (3); and Real Property Actions and Proceedings Law Section 1511 (1) and (2).

STATEMENT OF THE CASE

The Petitioners, two not-for-profit corporations with purposes directed to the furtherance of African-American causes, and their African-American Chairman, filed this Civil Rights Complaint on August 18, 1994, alleging the violation of their Constitutional and Civil Rights pursuant to the First, Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. 1981, 1982, 1983 and 1988 by the Respondent public corporations whose agents, acting in concert with private citizens, had deprived Petitioners of their rights to hold real property and to be taxed equally with white persons, by transferring title to their real property to one of the Respondents, a white woman, on the pretext that the Petitioner Not-For-Profit corporations had not paid its 1975 Village taxes prior to the expiration of the period of redemption, when the taxes had, in fact, been paid.

The Federal Complaint also alleged violations of the rights of Petitioners to the equal protection of the laws on the grounds of their race by concealment by all Respondents of the fact that the real property taxes had been paid during the period of the equity of redemption, and by the agents of the municipal corporations appearing in every state court proceeding, on behalf of the white Respondents to request that the state court grant judgment to a non-party white woman, upholding the deed transferring title to their real property to her without any legal basis.

The Petitioners alleged that in every state court proceeding, the public officials misrepresented payment of the taxes by Petitioners, either by concealing the fact of payment, or by mischaracterizing the payment of the taxes on December 15, 1976 as payment of the 1976 taxes, rather than as a redemption of the 1975 tax sale certificate sold on February 16, 1976.

The decision of the United States District Court which was read from the bench, granting the motion for summary judgment, recited the fact that the Judgment of the State Court had been affirmed on appeal. The District Court Judge also stated that because the New York State Supreme Court and other state courts have concurrent joint jurisdiction over Federal Civil Rights, that the Plaintiffs were free to make the allegations in the case at bar in the actions before the New York State Supreme Court.

Background

In 1973, a 22-room mansion in Baldwinsville, New York

was donated to Kahre-Richardes Family Foundation, Inc., one of the Petitioner not-for-profit corporations, to foster programs devoted to African-American causes. Its Chairman was an African-American. In that same year, an application was made by Kahre-Richardes to have the real property declared to be exempt from real property taxes. While awaiting a decision on their application, Kahre-Richardes did not pay real property taxes for the year 1975 on tax day. On February 16, 1976 a Tax Sale Certificate to their property was sold to Rob Roy Pools, Inc. Upon being advised by letter from the Village Clerk on February 16, 1976 that a Tax Sale Certificate had been sold, which could be redeemed within 24 months from that date, Kahre-Richardes paid all taxes due and owing on December 15, 1976.

Although Petitioners had a receipt for the payment of their real property taxes from the Clerk of the Village of Baldwinsville on December 15, 1976, just ten months after receipt of the letter, and a cancelled check endorsed by the Treasurer of the Village of Baldwinsville, on October 27, 1978, the Village Treasurer issued a tax deed conveying Petitioners real property to Rob Roy Pools, Inc., a closely held corporation held by two white residents of Baldwinsville, on the basis of non-payment of the 1975 taxes. Petitioners did not learn of the transfer until February 29, 1980. A Proceeding pursuant to Real Property Actions and Proceedings Law Article 15 was commenced in New York State Supreme Court to set aside the deed as void. The jurisdictional issue of payment was never determined in State Court.

The State Court Proceedings

The Real Property Actions and Proceedings Law, Article 15 State Court proceeding was commenced in 1980 to set aside the tax deed transferring title to the property on the grounds that it was void. The Complaint was amended by Stipulation in 1988, alleging payment of the taxes by the not-for-profit corporation and asked for a declaratory judgment determining whether its use of the real property entitled it to a real property tax exemption. Neither issue was ever decided in the State Court.

On September 14, 1988, the Amended Complaint was served on Susan M. Weichert, who was named as a Defendant therein. On August 9, 1989, a motion was made by Susan M. Weichert to dismiss the Amended Complaint on the ground that she had never been personally served; thus, the court lacked personal jurisdiction over her.

On October 20, 1989, the motion to dismiss the Amended Complaint as to Susan M. Weichert was granted. The motion also dismissed the Amended Complaint of the Plaintiff Kahre-Richardes Family Foundation, Inc. on the ground that it was then without counsel.

On February 27, 1990, a motion was made by Rob Roy Pools, Inc. to dismiss the complaint of Robert S. Pritchard on the ground that he had no cognizable interest in the property (although he resided in the property). (RPAPL Section 1511)

On April 16, 1990, the Court granted the motion to dismiss the Complaint of Robert S. Pritchard on the ground

that he had no cognizable interest in the real property. The Court held that Robert S. Pritchard could remain as a Defendant to answer the Counterclaim of Susan M. Weichert since he resided in the property.

The State Court dismissed the Complaint as to Defendant Robert M. Weichert on January 31, 1992.

On June 26, 1992, the State Court granted summary judgment and dismissed the State Court Complaint on the ground that the statute of limitations had run to challenge a specific tax assessment, although no issue had ever been raised regarding any specific tax assessment.

REASONS FOR GRANTING CERTIORARI

I.

The Decision of the Court Below Summarily Dismissing the Civil Rights Complaint in the United States District Court on the Grounds of Res Judicata Because of a Prior New York State Judgment Without a De Novo Review of the Elements Considered by the New York State Court in Applying the Transactional Analysis Rule was Erroneous

The Decision of the Second Circuit which affirmed the judgment of the District Court dismissing the Petitioners' Civil Rights Complaint on the grounds of res judicata because of a prior New York State judgment had preclusive effect on the Federal Complaint is believed to be erroneous and contrary to the applicable law.

The United States Constitution, Article 4, Section 1, is implemented by the Federal Full Faith and Credit Statute, 28 U.S.C. Section 1738. It is now settled that a Federal Court must give to a State Court Judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered, and that the law of res judicata of that State must be applied. *Marrese v. American Academy of Ortho Surgeons,* 470 U.S. 373 (1985); *Migra v. Warren City School District Board of Education, et. al.,* 464 U.S. 75 (1984). Here, the underlying judgment was obtained in New York State, which has adopted a Transactional Analysis approach in applying the doctrine of res judicata or claim preclusion. It provides that once a claim is brought to a final conclusion, all other claims arising out of the same transaction are barred between the same parties, even if based upon different theories or seeking a different remedy. *O'Brien v. Syracuse,* 54 NY2d 353 (1981); *Brown v. Lockwood,* 76 AD2d 721 (1980); *Studley, Inc. v. Lefrak,* 48 NY2d 954 (1979); *Heimbach v. Chu,* 744 F2d 11, cert. den. 470 U.S. 1084 (1985), and not only are claims that were actually litigated barred, but also claims that could have been litigated between the parties are likewise barred. *Nottenberg v. Walber 985 Company,* 160 AD2d 574 (1990).

In order to determine whether the prior state court judgment had preclusive effect on the Federal Complaint, the Second Circuit should have examined the pleadings and proceedings in the State Court. It should then have examined the elements necessary to establish the Civil Rights claims alleged in the Federal Complaint. United States Constitution, Article IV, Section 1; 28 U.S.C. 1738; *People v. Roselle,* 84 NY2d 350, 357-358 (1994); *Collins v. City of Harker*

Heights, 503 U.S. ____ (1992).

An analysis of factors made by the New York State Courts in scrutinizing whether complaints should be dismissed because of res judicata includes:

(1) whether the State Court had jurisdiction to render the judgment;

(2) whether the State Court had jurisdiction of the parties when the judgment was granted;

(3) whether there was a final judgment on the merits;

(4) whether the parties in each proceeding are the same;

(5) whether the causes of action were the same;

(6) whether the judgment in the State action had been obtained without fraud and collusion,

(7) whether there had been a full and fair opportunity to defend the state action.

It is respectfully submitted that neither the District Court nor the Second Circuit made such a de novo analysis of the State Court action.

In the State Court proceedings, the issue of the payment has never been litigated. Although the State Supreme Court has subject matter jurisdiction to decide the issues raised in an RPAPL Article 15 case, it has been held for over 100 years in New York State and in other jurisdictions that a determination of whether taxes have been paid is a jurisdictional fact upon which the authority of the Court to transfer title to real property in a tax proceeding depends. *Cameron Estates, Inc. v. Deering, et. al.*, 308 NY 24 (1954), citing *Cooley on Constitutional Limitations*, p. 366, *3 Cooley*

on Taxation, 4th Ed., Sec. 1382, *Blackwell on Tax Titles*, 5th Ed., Sec. 155, and *Burroughs on Taxation*, p. 301; *Helterline v. People*, 295 NY 245 (1946); *Swandiak v. Boniface*, 161 AD2d 95 (1990); *Murphy v. Kassay*, 71 AD2d 696 (1979); *Chase v. Senter*, 41 AD2d 281 (1973); *Schuman v. Person*, 216 Ark, 732 (1950); *Gilliland v. Shuman*, 197 Okla. 365 (1946).

On October 20, 1989, the State Supreme Court granted the motion of Susan M. Weichert to dismiss the Amended Complaint of the not-for-profit corporation on the ground that the Court had never obtained personal jurisdiction of her because of lack of service. A Counterclaim had been interposed in the Answer of Susan M. Weichert based upon RPAPL Article 15, which alleged a cause of action which arose out of the very same facts as those which were alleged in the Amended Complaint of Plaintiffs. An objection based upon lack of jurisdiction over the person does not waive the jurisdictional objection so that the Counterclaim in the Answer of Susan M. Weichert arising out of the same cause of action was thereby also dismissed. *Textile Technologies v. Davis*, 81 NY2d 56 (1993).

The dismissal of a Complaint on the ground of lack of jurisdiction of the parties is not binding upon parties to the action and has no res judicata effect. *White Plains v. Hadermann*, 272 AD 507 (1947).

By Order dated April 16, 1990, the State Court granted a motion of Rob Roy Pools, Inc. and Robert M. Weichert to dismiss the Amended Complaint of Robert S. Pritchard on the ground that Pritchard "had no cognizable interest in the

property," even though he resided in the premises. The Court granted the motion which was, in reality, based upon the ground that Pritchard had no standing in the lawsuit. It has consistently been held that a dismissal of a Complaint for lack of standing is not a dismissal on the merits. *Tak Shing David Tong v. Hang Seng Bank*, 210 AD2d 99 (1994).

By Order dated January 31, 1992, the State Court dismissed the Amended Complaint as to Robert M. Weichert on the ground that he had no estate or interest in the property. Thus, when the State Court judgment was entered on June 26, 1992, the only parties remaining in the lawsuit were Defendants Rob Roy Pools, Inc., The Village and County.

By Order dated October 20, 1989, the State Court dismissed the Amended Complaint of Kahre-Richardes because the not-for-profit corporation appeared in Court without counsel. The Complaint was also dismissed as to Susan M. Weichert for lack of jurisdiction. There has been no final judgment regarding the above parties. The Complaints of Plaintiffs Kahre-Richardes and Robert S. Pritchard had been dismissed for at least 14 months prior to the Order granting Summary Judgment to Susan M. Weichert on June 26, 1992.

It is also clear that the parties in the State Court proceeding and in the Federal Court proceeding were not the same. At the time the judgment was entered in the State Court proceeding, the Amended Complaint had been dismissed as to all of the Plaintiffs by April 11, 1991. The Amended Complaint had been dismissed as to Susan M. Weichert on October 20, 1989 and Robert M. Weichert on January 31,

1992. The parties were not the same and the State Court judgment, therefore, had no preclusive effect. *Green v. Santa Fe Industries*, 70 NY2d 244 (1987); *Good Health Dairy Products v. Emery*, 275 NY 14 (1958). See also *Arroyo v. Marlow*, 128 Misc2d 950, 953-954 (1985) which cites *Matter of American Ins. Co. [Messinger-Aetna Cas. & Sur. Co.]*, 43 NY2d 184, 189 (1977); *Matter of Newsday, Inc. v. Ross*, 80 AD2d 1 (1981); and *Gramatan Home v. Lopez*, 46 NY2d 481 (1979).

Further, the causes of action were not identical in the State and Federal Actions. The relief demanded in the State Complaint was to have a tax deed cancelled of record in which Plaintiffs alleged payment of their taxes prior to the expiration of the period of redemption and to have a determination as to the tax exempt status of the corporate property.

It was also alleged in the Federal Complaint that the State agents used their superior influence and the financial resources of the municipal corporations in the State Court proceedings by joining in the legal proceedings on behalf of Respondent Susan M. Weichert to confiscate the property of Petitioners and give it to a private citizen, in violation of the U.S. Constitution, Amendment 14.

In determining whether a judgment will be given preclusive effect, the Courts have considered whether the prior State Judgment was obtained without fraud and collusion. It was alleged in the Federal Complaint that the State agents concealed the fact of the payment of the taxes and misrepresented the effect of the payment in the State

Court and in the Federal Court, and continue to do so. The Respondent Village failed and refused to issue a Certificate of Redemption for the property to the Petitioners upon the payment of their taxes on December 15, 1976, as is required by law, and has continued to refuse to issue the Certificate of Redemption, maintaining that by the Petitioners' payment of their taxes, that only the 1976 taxes were paid. The Village denied that by the Petitioners' payment of the taxes within the period of redemption, pursuant to RPTL 1456 and the February 16, 1976 letter of Village Clerk Rita Virginia, that the Tax Sale Certificate purchased by Rob Roy Pools, Inc. for $303.25 was thereby redeemed. The allegations of non-payment have been made by four attorneys in spite of the receipt for payment signed by the Village Clerk and a copy of the cancelled check. *Guardian Life Ins. v. Handel,* 190 AD2d 57 (1993).

Where matters are excluded from consideration in a prior suit, they cannot be removed from a later suit under the doctrine of res judicata. *Salwen Paper Company v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.,* 72 AD2d 385, later appeal 110 AD2d 895 (1980); *Murphy v. Erie County,* 28 NY2d 80 (1971).

> "Claim that state court judgment, which opposing party claims to preclude subsequent action under 42 USCS Section 1983, is void for want of jurisdiction may properly be raised for first time in Section 1983 action." *Sheiner v. New York,* (1985 ED NY), 611 F Supp 172.

In the State Court Proceeding, where the Petitioners

were never permitted to litigate payment of the taxes or their tax exempt status, to deny them one day in Court deprived them of their First, Fifth and Fourteenth Amendment Rights and violated 42 U.S.C. 1981, 1982, 1983 and 1988.

In this proceeding, the standard of review for an appellate court in determining the propriety of a motion for summary judgment is de novo. *Bose Corp. v. Consumer's Union of U.S.*, 466 U.S. 485 (1984). All of the above factors should have been carefully reviewed by the Appellate Court. The Decision of the Court failed to reflect a de novo consideration of the procedure in this case, which deviated markedly from other cases regarding tax sales in New York State.

II.

The Affirmance Of The Granting Of The Motion For Summary Judgment Dismissing This Civil Rights Complaint On The Grounds of Res Judicata, Which Failed To Determine the Issue of Payment Is In Conflict With The Decisions of The Highest Court of New York State And Has Sanctioned Such Departure By The State Court And By The District Court to as To Call For The Exercise of This Court's Power of Supervision

For more than a century, the Courts of New York State have held that a tax deed is void when the taxes have been paid. As stated in *NY & Brooklyn Inv v. Leeds*, 100 Misc2d 1079 (1979), quoting *Joslyn v. Rockwell*, 128 N.Y. 334, (1891), the Court stated:

> "Here the right to sell the plaintiff's property in foreclosure proceedings for nonpayment of the taxes never existed. Delinquency in payment of the taxes is a condition precedent to the commencement of such a proceeding and when paid, the right to foreclose for nonpayment ceases."

The Amended Complaint in State Court, dated September 14, 1988, alleges payment of the taxes to the Village. Payment of the very taxes for which a tax deed is issued voids any tax deed.

As early as 1946, in *Helterline v. People of the State of New York*, 295 NY 245 (1946), the Court of Appeals held

> "In the latter two years the south half of lot 91 (the lands in question) was assessed as resident lands and the taxes levied thereon were in fact paid. This sale was wholly void and the tax deed did not confer title on the State (*People v. Hagadorn*, 104 N.Y. 516, 524). * * * The purpose of the prescribed statutory process for assessment, sale and redemption is to compel payment of taxes overdue and, in default of such payment, to transfer the title of real estate from the owner thereof to another without the owner's consent. This being the nature of the process, the owner's title may not be divested unless statutory requirements are strictly observed. Nor may the Legislature by its fiat make legal a deed which was theretofore absolutely void because of jurisdictional defects. A curative act enacted for such a purpose is unconstitutional and void. It is an

> attempt to deprive the owners of the land of their property without due process of law. (*Dunkum v. Maceck Building Corp.*, 256 N.Y. 275; *Marx v. Hanthorn*, 148 U.S. 172; *Wallace v. McEchron*, 176 N.Y. 424; *Cromwell v. MacLean*, 123 N.Y. 474.)"

In *Cameron Estates Inc. v. Deering, et al.* 308 NY 24 (1954), the Court of Appeals made it patently clear that a tax deed granted for non-payment of specified taxes, when those taxes have actually been paid, renders the tax deed issued absolutely void.

See also, *Swandiak v. Boniface*, 161 AD2d 995 (1990); *Murphy v. Kassay*, 71 AD2d 696 (1978); *Petition of Town of Brookhaven*, 78 Misc2d 499 (1974); *Chase v. Senter* (41 AD2d 281(1973); *Conklin v. Jablonski*, 67 Misc2d 286 (1971); *Behm v. Armstrong* (1968, 3rd Dept.) 29 AD2d 717; *Challette, Inc. v. Leeds* (1967, 2nd Dept.) 28 AD2d 717; *Union & New Haven Trust v. People* (1961, 3rd Dept.) 15 AD2d 1; *Weaver Sons Co. v. Burgess*, 7 NY2d 172 (1959); *Kemp v. Hunt, et. al.*, 208 AD 621(1944); *Middle Island Land & Water Co. v. Hutner*, (1940) 259 AD 294; *Bryan v. McGurk*, 200 N.Y. 332 (1911); *Wallace v. McEchron*, 176 New York - 14 Bedell (1903).

When the State Court dismissed the Amended Complaint, which alleged tender and payment of the taxes, it precluded the Plaintiffs from litigating the most fundamental issue to be determined before deciding the validity of the tax deed. It prevented the Plaintiffs from presenting proof that the taxes had been paid ten months after the payment for the Tax Certificate, during the period of redemption, and that

payment of the taxes effected a cancellation of the said Certificate dated January 28, 1976, so that any deed issued as a result thereof was null, void and of no effect.

Whether a judicial determination that a tax deed is void when payment of the real property taxes has been timely made is open to question in view of Real Property Tax Law Article 14 and the holdings in the aforementioned cases. However, where the issue is formally raised in a juridical proceeding, a determination of the issue should be made.

The decision in the State proceeding was completely consequential, since it has consistently been held that when real property taxes have in fact been paid, there is no statute of limitations circumscribing the time in which to bring an action to clear title to resident property. *Cameron Estates Inc. v. Deering, et al. (supra).*

In the State Court proceedings, where the State Supreme Court dismissed the Complaint and Plaintiffs for the fourth time and declared title to Petitioners' property was vested in Susan M. Weichert on the ground that a four-month statute of limitations applicable to an Article 78 proceeding forever barred the claims of the Plaintiffs, a decision of the State Court on the issue of payment should have been made.

The Decision of the State Court has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

III.

The Decision Of The Second Circuit Affirming The Judgment Of The District Court Granting The Motion For Summary Judgment On The Grounds Of Res Judicata Dismissing This Civil Rights Complaint Because Of A Prior New York State Judgment Sets A Dangerous Precedent Which Undermines The Confidence Of The Public To Rely Upon Their Payment of Taxes To Protect Their Rights To Retain Title to Their Real Property

Real property taxes are an important source of revenue to taxing authorities. The statutory process of selling real property for the non-payment of taxes must be strictly observed. The Court in *Helterline v. People (supra)* stated:

> "The purpose of the prescribed statutory process for assessment, sale and redemption is to compel payment of taxes overdue and, in default of such payment, to transfer the title of real estate from the owner thereof to another without the owner's consent. This being the nature of the process, the owner's title may not be divested unless statutory requirements are strictly observed."

It is equally important that if statutory requirements are observed, that the Courts protect the taxpayer from the unconstitutional confiscation of real property once payment is made.

The proceedings in the State Court are shocking to the conscience and appalling. This was recognized by the Second

Circuit which, in its Summary Order, stated that the Order of Affirmance of the dismissal of the Civil Rights Complaint would not be cited as precedential authority.

The integrity of the taxing process must be maintained in order to provide needed revenue for government. The Decision of the Second Circuit sanctions such an extreme departure from the accepted and usual course of judicial proceedings as to warrant an exercise of the Supreme Court's power of supervision.

IV.

Where The Same Set of Facts Would Not Sustain Both Causes of Action, It Was Error For The Court Below To Dismiss The Federal Complaint on The Grounds of Res Judicata

In 1980, Petitioners commenced an action in the State Court to clear title to real property. It was long after the State Court Complaint had been interposed that Petitioners ascertained that the State Court was unable or unwilling to protect their Civil Rights. The continuing injury which informed the factual allegations in the federal action was distinguishable from the factual allegations which informed the State action.

The Federal Complaint alleged violations of the Civil and Constitutional Rights of the Petitioners based upon the State action of the agents of the Village and County. It alleged that the State Respondents, together with the private Respondents, concealed the payment of the taxes by the

Petitioners throughout the State Court proceedings, and have continued to conceal the payment of the taxes and their proper application even in the Federal Court proceedings.

The Petitioners alleged disparate treatment by the Village and County on the basis of their race. It is clear that the causes of action in the State and Federal Complaints are not identical. The acts alleged in the Federal Complaint occurred subsequent to those alleged in the State Complaint. *Brown v. Lockwood, (supra).*

The Complaint should not have been dismissed on the grounds of res judicata.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully pray that their Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Dated: July 28, 1996

* Counsel of Record

Appendix A - Summary Order of the
U.S. Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 30th day of April, one thousand nine hundred and ninety-six.

PRESENT: HONORABLE JON O. NEWMAN,
Chief Judge
HONORABLE JAMES L. McLAUGHLIN,
HONORABLE JOSE A. CABRANES,
Circuit Judges

KAHRE-RICHARDES FAMILY FOUNDATION, INC.; PANAMERICAN/PANAFRICAN ASSOCIATION, INC., as successor-in-interest to the Panamerican Association for the Festival of the New World, Inc.; ROBERT S. PRITCHARD, individually and as Chairman,

Plaintiffs-Appellants

v.

95-7909

THE VILLAGE OF BALDWINSVILLE, NEW YORK, COUNTY OF ONONDAGA; JOHN DOE and RICHARD ROE, in their capacities as agents of Onondaga County and the Village of Baldwinsville; ROB ROY POOLS, INC.; ROBERT M. WEICHERT and SUSAN M. WEICHERT, in their individual capacities and as officers of Rob Roy Pools, Inc.,

Defendant-Appellees

APPEARING FOR APPELLANTS: Barbara M. Sims, Buffalo, N.Y.

APPEARING FOR APPELLEES: Verner R. Love, Syracuse, N.Y.

Appeal from the United States District Court for the Northern District of New York (Frederick J. Scullin, Jr., Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED.

Kahre-Richardes Family Foundation, The Panamerican-Panafrican Association, Inc., and their chairman, Robert S. Pritchard, appeal from the August 17, 1995, judgment of the District Court, granting summary judgment for the appellees on the grounds of res judicata. Appellants argue that their federal civil rights claim is not barred by final judgments of the New York state courts because their state court claims challenged the validity of the 1975 tax assessment rather than the allegedly deceptive actions of the county and municipal officers.

Appellants' claim lacks merit. Under both the Constitution's Full Faith and Credit Clause and federal statutes implementing it, federal courts must give the same preclusive effect to final judgments of state courts as would the courts of that state. U.S. Const., Art IV, Section 1; 28 U.S.C. Section 1738 (1994); Allen v. McCurry, 449 U.S. 90, 96, 101 S. Ct. 411, 415-16 (1980). This principle fully applies to federal civil rights claims that could have been, but were not, raised in an earlier proceeding in state court. Migra v. Warren City School District Board of Education, 465 U.S. 75, 83-84, 104 S.Ct. 892, 897 (1984).

Under New York's transactional approach to res judicata, a cause of action is "'coterminous with the transaction regardless of the number of substantive theories or variant forms of relief . . . available to the plaintiff.'" Smith v. Russell Sage College, 54 N.Y.2d 185, 192, 445 N.Y.S.2d 68, 71

(1981) (quoting Restatement (second) of Judgments Section 61 cmt. a (Tent. Draft No. 4, 1978)). A claim is precluded if it arises out of the same events, even if the newly-asserted claim emphasizes different facts. Smith, 54 N.Y.2d at 192, 445 N.Y.S.2d at 71; Couri v. Westchester Country Club, Inc., 186 A.D.2d 715, 716, 589 N.Y.S.2d 494, 496 (App. Div. 1992), leave to appeal dismissed in part, denied in part, 81 N.Y.2d 912, 897 N.Y.S.2d 931 (1993).

Appellants civil rights claim, like their claim for improper tax assessment, arises out of the 1975 assessment of taxes on the property "Applecrest," the municipal acquisition of the property by tax sale and assignment to Rob Roy by tax sale deed, and the eventual eviction of appellants. Although the federal claim emphasizes the conduct of the state actors in effecting the tax sale while the state law claims challenged the validity of the tax assessment itself, both the federal and the state claims arise out of the same events. The state court's ruling that the tax assessment challenge was barred by the statute of limitations bars a second action. Smith, 54 N.Y.2d at 194, 445 N.Y.S.2d at 72.

Leave to amend need not have been granted for reasons stated in the Magistrate Judge's recommendation. Moreover, no timely objection was made to that recommendation. Wesolek v. Canadair Ltd., 838 F.2d 55, 58 (2d Cir. 1988).

/s/ Jon O. Newman
Chief Judge
/s/ James L. McLaughlin
/s/ Jose A. Cabranes
Circuit Judges

Appendix B: Order of the U.S. District Court for the Northern District of New York

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

KAHRE-RICHARDES FAMILY FOUNDATION, INC.; PANAMERICAN/PANAFRICAN ASSOCIATION, INC., as successor-in-interest to the Panamerican Association for the Festival of the New World, Inc.; ROBERT S. PRITCHARD, individually and as Chairman,

Plaintiffs

v. **94-CV-1045** FJS/GJD

THE VILLAGE OF BALDWINSVILLE, NEW YORK, COUNTY OF ONONDAGA; JOHN DOE and RICHARD ROE, in their capacities as agents of Onondaga County and the Village of Baldwinsville; ROB ROY POOLS, INC.; ROBERT M. WEICHERT and SUSAN M. WEICHERT, in their individual capacities and as officers of Rob Roy Pools, Inc.,

Defendants

FREDERICK J. SCULLIN, JR., D.J.:

ORDER

After giving due consideration to the written submissions and oral arguments of the parties, at its May 5, 1995, Motion Calendar the Court rendered decision from the bench granting the joint motions of defendants the Village of Baldwinsville,

the County of Onondaga, John Doe and Richard Roe, Rob Roy Pools, Inc., Robert M. Weichert, and Susan M. Weichert for summary judgment in the above-captioned matter pursuant to Fed. R. Civ. P. 56 for reasons stated in the record at that time. The motions were made alternatively under Fed. R. Civ. P. 12 and 56, and the Court resolved them under Rule 56, as the parties clearly anticipated by their submission of matters outside the pleadings.

Therefore, it is hereby

ORDERED, that defendants' motion for summary judgment on the basis of res judicata is GRANTED. It is further

ORDERED, that defendants' cross-claims for contribution and indemnity are DISMISSED as moot. It is further

ORDERED, that defendants' motion for attorneys' fees and costs is DENIED without prejudice to renew.

IT IS SO ORDERED.

Dated: August 16, 1995.
Syracuse, New York

/s/ Frederick J. Scullin, Jr.
U.S. District Court Judge

Appendix B: Judgment of the U.S. District Court
for the Northern District of New York

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK
JUDGMENT IN A CIVIL CASE

KAHRE-RICHARDES FAMILY FOUNDATION, INC.; PANAMERICAN/PANAFRICAN ASSOCIATION, INC., as successor-in-interest to the Panamerican Association for the Festival of the New World, Inc.; PANAMERICAN ASSOCIATION FOR THE FESTIVAL OF THE NEW WORLD, INC., and ROBERT S. PRITCHARD, individually and as Chairman of the Kahre-Richardes Family Foundation, Inc. and the Panamerican-Panafrican Association, Inc.

v. **CASE NUMBER: 94-CV-1045 (FJS)**

THE VILLAGE OF BALDWINSVILLE, NEW YORK, COUNTY OF ONONDAGA; JOHN DOE and RICHARD ROE, in their capacities as agents of Onondaga County and the Village of Baldwinsville; ROB ROY POOLS, INC.; ROBERT M. WEICHERT, Individually and as an Officer of Rob Roy Pools, Inc., and SUSAN M. WEICHERT, Individually and as an Officer of Rob Roy Pools, Inc.,

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the defendants' motion for Summary Judgment on the basis of res judicata is granted; ordered that the defendants' cross claims for contribution and indemnity are dismissed as moot.

Further ordered that the defendants' motion for attorneys' fees and costs is denied without prejudice to renew.

All of the above pursuant to the order of the Honorable Frederick J. Scullin, Jr., dated the 16th day of August, 1995.

Dated: August 17, 1995

GEORGE A. RAY
CLERK
/s/ Joanne Walker
(BY) DEPUTY CLERK

Appendix B: Decision from the Bench of
Hon. Frederick J. Scullin, U.S. District Court Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

KAHRE-RICHARDES FAMILY FOUNDATION, INC.; PANAMERICAN/PANAFRICAN ASSOCIATION, INC., as successor-in-interest to the Panamerican Association for the Festival of the New World, Inc.; ROBERT S. PRITCHARD, individually and as Chairman,

Plaintiffs

v. **94-CV-1045**
FJS/GJD

THE VILLAGE OF BALDWINSVILLE, NEW YORK, COUNTY OF ONONDAGA; JOHN DOE and RICHARD ROE, in their capacities as agents of Onondaga County and the Village of Baldwinsville; ROB ROY POOLS, INC.; ROBERT M. WEICHERT and SUSAN M. WEICHERT, in their individual capacities and as officers of Rob Roy Pools, Inc.,

Defendants

FREDERICK J. SCULLIN, JR., D.J.:
Decision from the Bench: May 5, 1995

THE COURT: All right, Counsel. I have read your papers. The Court is prepared to make a decision at this point in time.

Under the Constitution's Full Faith and Credit Clause and 28 U.S.C. Section 1738, federal courts must give state courts'

judgments the same preclusive effect they enjoy in the court of the issuing state. And I am citing Migra versus Warren City School District Board of Education, 465 U.S. 75, pages 80-81.

The extent to which a state judgment precludes an action in federal court is determined by the law of the state that issued the relevant judgment -- in this case, New York.

New York has adopted a Transactional approach to res judicata for claim preclusion. That has been conceded by counsel.

Under this approach, once a claim is brought to its final conclusion, res judicata operates to bar "a later claim arising out of the same factual grouping as an earlier litigated claim, even if the later claim is based on different legal theories or seeks dissimilar or additional relief."

Burgos v. Hopkins, 14 F.3d 787 at Page 790, that is a Second Circuit 1994 case. "If the above requirements are met, the res judicata bar operates unless 'the initial forum did not have the power to award the full measure of the relief sought in the later litigation.'"

Now, the two previous actions in the New York State Supreme Court arise out of the same factual grouping such that the facts that form the basis for the case at bar and the previous actions form a convenient trial unit.

The case at bar arises out of a conflict between these parties over tax assessments, a tax sale, and subsequent transfer of title to Applecrest. That was the sole concern of

the fourteen-year litigation in the New York State Supreme Court described above.

Further, it is clear that the New York actions, most importantly the 1980 action, have proceeded to final judgments. I believe that is conceded as well.

MRS. SIMS: This is not conceded. I have not been able to finish my argument.

THE COURT: If it isn't conceded, the Court makes a finding they have proceeded to final judgment.

MRS. SIMS: May I put on the record what my argument is so that I will have it documented?

THE COURT: You may have this decision. You can get a copy of this when I am through reading it and you may appeal this decision.

MS. SIMS: I am asking if I can put on the record my arguments which would indicate that there is no final judgment on the merits in this case.

THE COURT: I will tell you one more time. I am now reading the decision. You have interrupted me twice, now. Please be seated until I am through reading this decision.

Now, the plaintiffs note that in order for the doctrine to apply, the second action must involve the same "cause of action" as the prior lawsuit. However, the New York Court of Appeals defines "cause of action" pragmatically as

"coterminous with the transaction, regardless of the number of substantive theories or variant forms of relief available to the plaintiff."

In the context of res judicata a "cause of action" or a "transaction" is merely a "factual grouping" that forms a "convenient trial unit."

I will omit citations.

The Court of Appeals has held that summary judgment granted on the basis of statute of limitations and statute of frauds was "on their merits" for the purposes of claim preclusion.

Further, the intent to file an appeal, or the pendency of an appeal, does not affect the res judicata effect of a state court judgment. It is still final.

I will cite to you Hwang against Dunkin' Donuts, Incorporated, 840 F. Supp. 193 at Page 197; Coleco Industries Incorporated versus Universal City Studios, Inc., 637 F. Supp. 148 at Page 150.

Further, Justice Stone's final judgment in the 1980 action has been affirmed by the Appellate Division, Fourth Department.

Now, the only other inquiry the Court must now make is to whether, in the previous actions, the New York Supreme Court had the power to award the full measure of the relief sought in the case at bar.

From this Court, plaintiffs seek a judgment against defendants jointly and severally, comprising compensatory damages of twenty-two million dollars, attorneys' fees and costs, post-judgment interest, and an Order enjoining the plaintiffs from "pursuing policies and practices which have the intent and effect of denying the plaintiffs their constitutional and civil rights."

I am referring to the complaint at Page 24 and 25.

The New York State Supreme Court and other State courts have concurrent joint jurisdiction over federal civil rights. I will omit citations for that.

Thus, the plaintiffs were free to make the allegations in the case at bar in either of the above-described actions before the New York Supreme Court.

The New York Supreme Court is a court of general jurisdiction with no limitations upon the amount of damages that may be sought and few limitations upon the causes of action that may be brought, none of which are applicable here.

Thus, the New York Supreme Court had the power to award the full measure of relief that the plaintiffs now seek before this court, however, they failed to do so for whatever reason.

Plaintiffs' theories of recovery were as available to the plaintiffs in the first New York Supreme Court action concerning the transfer of Applecrest as it is in the present action.

Plaintiffs failed to raise the present theories of liability before the New York Supreme Court in fourteen years of state litigation.

Because plaintiffs' previous state and federal claims originate from identical facts and the New York State Supreme Court had jurisdiction and "the power to award the full measure of the relief sought in the present action," the New York doctrine of res judicata compels this Court to conclude that the plaintiffs' action is barred.

Defendants' motion is granted and the complaint is dismissed with prejudice.

Because of this disposition, defendants' cross-claims for contribution and indemnity are dismissed as moot.

Although defendants' notice of motion includes a request for attorneys' fees and costs, there is little argument in the papers.

Other than the demand for relief, the defendants have submitted no authority demonstrating either that they are entitled to such fees and costs or proposing a reasonable value for such costs.

While the Court notes that defendants may be entitled to fees and costs under 42 U.S.C. Section 1988, I will, at this time, deny that motion with leave to renew with the proper authority.

In conclusion, based upon this analysis, the defendants'

motion for summary judgment on the basis of res judicata is granted and plaintiffs' complaint is dismissed with prejudice.

The defendants' cross-claims for contribution and indemnity are dismissed as moot.

Finally, defendants' motion for attorney's fees and costs is denied without prejudice to renew.

That is the decision of the Court.

Appendix C: Constitutional and Statutory Provisions Involved

United States Constitution, Article IV, Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

United States Constitution, Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code: 28 USCS Section 1738: The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Federal Civil Rights Act 42 U.S.C. Section 1981: Equal Rights Under the Law. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Federal Civil Rights Act 42 U.S.C. Section 1982: Property Rights of Citizens. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Federal Civil Rights Act 42 U.S.C. Section 1983: Civil Action for Deprivation of Rights. Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. * * *

Federal Civil Rights Act 42 U.S.C. Section 1988: Proceedings in Vindication of Civil Rights. The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect * * * In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title * * * the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

New York State Real Property Tax Law, Section 1454. Tax Sale.

3. In all cases where no bid is made on a parcel of land offered for sale for an amount sufficient to pay the tax, interest and charges, the premises shall be deemed to have been sold to and purchased by the village. The treasurer shall make certificates of sale of all lands so bid in by, or sold to the village, describing the lands purchased, such certificates to be signed and acknowledged in the same manner as a deed to be recorded, and such certificates shall be subject to the same right of redemption as those purchased by individuals and if the land so sold is not redeemed as provided in this title, the village shall have the same rights as to foreclosure proceedings, or conveyance to it, as an individual purchasing at such sale.

5. If any purchaser at any sale of lands for unpaid taxes made pursuant to the provisions of this section, neglects or refuses to pay the amount of his bid within the time prescribed, the village treasurer may state an account against such purchaser and may recover the same with costs from such purchaser by an action brought in the name of the village treasurer, or such village treasurer may cancel such sale to such purchaser and the parcel so sold shall be deemed to have been purchased by the village.

New York State Real Property Tax Law, Section 1456, Redemption:

1. The owner, occupant or any person having an interest in any real property sold for taxes to any party other than the village may redeem the same at any time prior to the filing of a notice of pendency of an action to foreclose the lien of such taxes, or prior to conveyance by the village treasurer pursuant

to section fourteen hundred sixty-four of this chapter, by paying to the village treasurer for the use of the purchaser, his heirs or assigns, the sum mentioned in his certificate with interest from the date of sale. * * *

3. The moneys received by the village treasurer pursuant to section fourteen hundred fifty-four of this chapter and this section shall belong to the village, except for the moneys received by the treasurer for the redemption of lands sold to individual purchasers for taxes, interest and charges paid by the purchaser, which moneys shall be remitted to such individual purchaser upon surrender of the certificate issued at the sale duly marked for cancellation.

Section 1464. Application for deed; conveyance by village treasurer.

1. If any parcel of real property sold for taxes pursuant to section fourteen hundred fifty-four of this chapter is not redeemed within a period of two years, the owner of the certificate of sale may commence an action to foreclose his tax lien pursuant to law or may make application for conveyance to him by deed of the real property described in such certificate. Before making such application the owner of such tax certificate shall serve a notice to redeem by certified or registered mail upon the record owner, and mortgagee if any, of the real property affected by such tax certificate by mailing the same to him using his name and address as it appears on the records of the collecting officer. In the event that the records of the collecting officer fail to disclose such name or address, then the notice shall be mailed to the name and address as it appears on the records in the office of clerk of the county in which such real property is situated. If the real property or any part thereof is in the actual occupancy of

any person, a further notice to redeem shall be served on the occupant personally, by leaving the same at the residence of the occupant with a person of suitable age and discretion belonging to his family or by mailing the same by certified or registered mail. * * *

2. Such notice to redeem shall set forth (a) a brief description, sufficient for identification, of the real property affected by such tax certificate, (b) the amount due on account of such tax certificate, (c) a statement that the amount required for redemption consists of the amount of such tax certificate, with interest and penalties thereon, the amounts of all tax liens, assessments and other legal charges of such village subsequent in time with interest and penalties thereon together with any sums actually expended for title searches not to exceed ten dollars for each parcel and disbursements for postage and (d) a statement that in order to redeem such property the total amount due must be paid to the collecting officer within six months from the date of service of such notice.

3. If the real property described in such notice is not redeemed within the time limited, the village treasurer shall, upon written application and the surrender of the certificate of sale together with proof of service by mail of the notice to redeem, or upon application by the board of trustees of the village with such proof of service, execute and deliver to the purchaser or village a conveyance of the real property so sold, the description of which shall include a specific statement of whose title or interest is thereby conveyed, as appears on the record, which conveyance shall vest in the grantee an absolute estate in fee, subject, however, to all claims the village, county or state may have thereon for taxes, liens or encumbrances.

New York State Real Property Actions and Proceedings Law, Section 1511. Additional parties.

1. In an action brought under this article, the person in possession shall be made a party to the action, and when such person claims the right of possession, or an interest in the real property, under another, such other person shall also be made a party.

2. Where it appears to the court that a person not a party to the action may have an estate or interest in the real property which may in any manner be affected by the judgment, the court, upon application of such person, or of any party to the action, or on its own motion, may direct that such person be made a party.

Supreme Court, U.S.
FILED
AUG 29 1996
CLERK

No. 96-166

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1996

THE KAHRE-RICHARDES FAMILY FOUNDATION, INC., et al.,

Petitioners,

V.

THE VILLAGE OF BALDWINSVILLE, et al.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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Counsel for Respondents

QUESTION PRESENTED

The Petitioners herein failed to pay their Village of Baldwinsville Real Estate Taxes for the real property involved for the tax year 1975. Petitioners commenced an action in the New York State Supreme Court in 1980 to, inter alia, set aside the Tax Deed issued in 1978 by the Respondent, Village of Baldwinsville to Respondent Rob Roy Pools, Inc. by reason of the unpaid taxes. In 1992 the State Court made a final Judgment and Order granting that Respondent Susan M. Weichert's claim of ownership was absolute and superior to all others, including Petitioners herein. Respondents prevailed on all appeals in the State Courts. In 1994 a second New York State Supreme Court action was commenced by Petitioners against Respondents seeking again, inter alia, to set aside the aforementioned 1978 Tax Deed. Respondents again prevailed in this 1994 State Court action and on appeal from same. Petitioners' Attorney, Barbara Sims, was sanctioned by both the New York State Supreme Court and Appellate Division for litigating and appealing a frivolous lawsuit. Petitioners then commenced this Civil Rights case in the Northern District of New York Federal Court wherein all causes of action against all Respondents were dismissed on Motion for Summary Judgment as barred by application of the doctrine of res judicata. The U.S. Court of Appeals for the Second Circuit unanimously affirmed the lower Court's decision.

The question is: Whether the Court of Appeals erred by affirming the Judgment of the District Court, granting the motion for Summary Judgment dismissing the Complaint?

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No. 96-166

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1996

THE KAHRE-RICHARDES FAMILY FOUNDATION, INC., et al.,

Petitioners,

V.

THE VILLAGE OF BALDWINSVILLE, et al.,

Respondents.

STATEMENT OF THE CASE

This Appeal is from an Order of the Federal District Court, Frederick J. Scullin, Jr., D.J., dated August 16, 1995 and entered August 17, 1995, granting the joint motion of all Respondents for summary judgment on the basis of res judicata, dismissing the cross-claims of Respondents for contribution and indemnity as moot, and denying the joint motion of all Respondents for attorneys' fees and costs without prejudice to renew.

The Complaint alleges violation of various rights of Petitioners, pursuant to §§1981, 1982, 1983, 1985, 1986 and 1988 of Title 42 of the United States Code and violation of Petitioners' rights pursuant to United States Constitution, Fourteenth Amendment because of the "race" of Petitioners.

The gravamen of the Petitioners' Complaint, at paragraph 22 therein (A-57, *references are to the Joint Appendix on Appeal to the United States Court of Appeals for the Second Circuit*); is that all Respondents from "on or about" 1973 until "on or

about" 1994 "...entered into an agreement or mutual understanding with each other and with other unnamed defendants, whereby they would deprive the Plaintiffs of the property referred to herein under color of law and would otherwise deny Plaintiffs' equal rights, privileges and protection of the laws because of their race."*

In its decision, the District Court held that this action is barred by the principle of "res judicata" by reason of two previous actions brought by Petitioners on "identical facts" in the New York State Supreme Court, both of which actions have proceeded to final judgment and through the New York Appellate process to completion (A-39). The Federal District Court determined that the causes of action and theories of recovery of Petitioners in this Federal action..."were as available to the Petitioners in the first New York Supreme Court action concerning the transfer of Applecrest as it is in the present action." The Court further held:

> **Because plaintiffs' previous State and Federal claims originate from the identical facts and the New York State Supreme Court had jurisdiction and "the power to award the full measure of the relief sought in the present action," the New York doctrine of res judicata compels this Court to conclude that the plaintiffs' action is barred.**
>
> **Defendants' motion is granted and the complaint is dismissed with prejudice (A-43).**

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*It should be noted, however, that Susan M. Weichert and the County of Onondaga were not made parties to the New York State Supreme Court Action, which Petitioners commenced in 1980, until the service of an Amended Complaint in 1988.

An action was first commenced by Petitioners against Respondents Village of Baldwinsville, Robroy Pools, Inc. and Robert M. Weichert in 1980, wherein Petitioners, pursuant to the provisions of New York Real Property Actions and Proceedings Law, Article 15, sought to bring an action to quiet title to the property which is the subject of this and the New York State actions located in the Village of Baldwinsville and known as "Applecrest". The Complaint in that action was amended in 1988 to include as Respondents Susan M. Weichert and the County of Onondaga.

The Petitioners in that action sought to attack the validity of a village tax deed given by the Village of Baldwinsville to Robroy in 1978 and the county tax deed given by the County of Onondaga to Susan M. Weichert in 1983.

In that action, Petitioners attacked the validity of the two deeds on all of the grounds which are set forth in their five causes of action alleged in this action before the Federal Court.

Petitioners in the State Court actions, which spread over 14 years, made no allegations relevant to violations of their New York State or federal civil rights nor of their rights under the New York State or Federal Constitutions.

By an Order dated June 26, 1992, the New York State Supreme Court, Onondaga County, Hon. Parker J. Stone, J.S.C. (A-188-191), granted the motion of Susan M. Weichert for Summary Judgment and dismissed the Petitioners' Complaint and amended complaint as to all Respondents and dismissed Petitioners' replies to the counterclaims of Susan M. Weichert and gave her final judgment on her counterclaims pursuant to RPAPL Article 15, and further ordered that Petitioners post an appeal bond in order to stay execution of judgment pending appeal.

That on June 26, 1992 New York State Supreme Court, Onondaga County, Hon. Parker J. Stone, J.S.C., also granted judgment to Susan M. Weichert, awarding her valid, absolute and unencumbered title to the property known as "Applecrest"

and further declaring that any claim which Petitioners have or might claim to have to Applecrest is without validity and of no force and effect and further granting that "plaintiffs and every person claiming under them are forever barred from asserting such claim, the invalidity of which is established in this action, to an estate or interest in the Applecrest property of any kind or nature whatsoever" and further decreed that Susan M. Weichert be awarded possession of the real property along with the costs and disbursements of the action. The Court further ordered that Mrs. Weichert's claim for damages for the withholding of the property be severed and survive the judgment. Mrs. Weichert's claim for damages remains yet to be litigated and is still pending before Justice Stone in State Supreme Court.

In his decision in the said action dated December 18, 1991 (A-245-252), Justice Stone held:

> **...as evidenced by the present amended complaint and prior complaints, as well as their position throughout this extended proceeding, the claims of the Foundation and Pritchard against Robroy are founded on their assertion that the assessment is void, which assertion is foreclosed by the passage of time. Under Kahal,* the foundation and Pritchard are clearly barred from raising the issue of the validity of the assessment as against the Village; accordingly, they must also be barred from attacking the validity of the assessment and disputes with other parties (at A-250).**

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* Kahal Bnei v. Town of Fallsburg (78 NY2d 194)

The Court then went on to state:

> **...the statute of limitations bars Pritchard and the Foundation from attacking Robroy's deed; Robroy has complied with all applicable requirements set forth in Article 14 of the Real Property Tax Law; Robroy's deed is valid; and Robert Weichert has no estate or interest in the property"(at A-252).**

The Court also held with regard to Susan M. Weichert:

> **Susan Weichert claims title to the property by virtue of a deed issued to her by the County of Onondaga on December 13, 1983. Her answer contains a counterclaim wherein she requests judgment declaring her to be the owner of the premises based on this deed. (Applecrest) The validity of this deed and the timeliness of any challenge thereto by Pritchard and the Foundation has not been addressed on this record..."(at A-251).**

The judgment dated June 26, 1992 was thereafter appealed by Petitioners. By orders dated November 19, 1993, the judgment was unanimously affirmed without opinion by the Appellate Division of the Supreme Court of the State of New York, Fourth Department (A-196). The motion for leave to appeal therefrom was denied in the New York Court of Appeals May 12, 1994 (A-200). A copy of Petitioners' Brief on this appeal in the New York State Appellate Division, Fourth Department, is in the record at A-318-331, and a copy of Respondent Susan M. Weichert's Brief in the Appellate Division on the same appeal is in the record at A-332-353.

On or about September 15, 1994, by warrant dated August 3, 1994, and signed by Hon. Parker J. Stone, J.S.C. (A-260, 261),

Petitioners were removed by the Sheriff of Onondaga County from the Applecrest premises and Respondent Susan M. Weichert was put into possession thereof.

Notwithstanding the foregoing decisions, orders and judgments of the Supreme Court and Appellate Courts of the State of New York, Petitioners commenced another action in State Supreme Court against Respondents in April 1994 seeking the exact same relief as in their previous action which had been commenced in 1980.

In response to this action, Respondents once again opposed the action by motion for summary judgment, this time on the ground of res judicata and statute of limitations and sought financial sanctions against Petitioners and their counsel by reason of frivolous conduct.

By Order dated August 3, 1994, Hon. Parker J. Stone, J.S.C. (A-270-273), the complaint was dismissed with prejudice in its entirety as to all Respondents. The court determined that the action of the Petitioners was "frivolous" and was commenced to obstruct the final judgment of the court of June 1992 and to delay the Petitioners' inevitable eviction from the Applecrest premises.

In his decision dated July 20, 1994 upon the said motion (A-266-269), Justice Stone held that the action of Pritchard and the Foundation was barred by the application of the doctrine of res judicata.

In that decision, Justice Stone stated that the Court's judgment of June 26, 1992, was conclusive with respect to all matters which were or could have been litigated in the previous action including all matters pertinent to the interests of Petitioners and Respondents, Robroy Pools, Inc. and Susan M. Weichert as raised by the complaint, counterclaims and replies in that action and all such matters which could have been raised in connection with those claims (emphasis added).

By its Orders and Memorandum Decisions dated September 29, 1995, the New York State Appellate Division, Fourth Department, affirmed the Orders of the Supreme Court dated

August 3, 1994 and November 3, 1994 (A-241-244) and unanimously held as to the August 3, 1994, Supreme Court Order as follows:

> **Order unanimously affirmed without costs, judgment ordered imposing sanction and matter remitted to Supreme Court for further proceedings in accordance with the following Memorandum: we affirm for reasons stated in the decision at Supreme Court (Stone, J.). We add only that these appeals are a continuing effort by plaintiffs' counsel "to delay or prolong the resolution of the litigation" (22 NYCRR 130-1.1[c][2]) and we therefore order that judgment be entered in accordance with 22 NYCRR 130-1.2 imposing a sanction against plaintiffs' counsel in the amount of $500.00. Further, we conclude that plaintiffs' counsel should compensate defendants for "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees" as a result of these appeals (22 NYCRR 130-1.1[a]).**

And as to the November 3, 1994, Supreme Court Order, the Court held as follows:

> **Order unanimously affirmed without costs, judgment ordered imposing sanction and matter remitted to Supreme Court for further proceedings in accordance with same Memorandum as in Kahre-Richardes Family Foundation v. Village of Baldwinsville, ([appeal no. 1] __AD2d__ [decided herewith]). (Appeal from Order of Supreme Court, Onondaga County, Stone, J. -**

Sanctions.)

Copies of the said Orders of the Appellate Division, both dated September 29, 1995, and the Memorandum Decisions of the Appellate Division relevant to said Orders, both dated September 29, 1995, are attached as Appendices A, B, C and D to this brief.

REASON TO DENY THE WRIT

THE CAUSES OF ACTION SET FORTH IN THE COMPLAINT ARE BARRED BY APPLICATION OF THE DOCTRINE OF RES JUDICATA. THE COURT BELOW DID NOT COMMIT ERROR IN GRANTING SUMMARY JUDGMENT TO ALL RESPONDENTS UPON THEIR JOINT MOTION.

That by reason of the foregoing, it is clear that the issues raised by Petitioners in this action as to the validity and regularity of the tax sale certificates and tax deeds issued by the Village and County to Robroy Inc. and Susan M. Weichert respectively have been fully and finally established in favor of Respondents after plenary action in the Courts of the State of New York and that Susan M. Weichert now holds absolute title to and enjoys possession of the Applecrest property.

Petitioners' Brief creates confusion and misleads this Court concerning the payments/non-payments by the Petitioners of the 1975 and 1976 Village real estate taxes for the property. Petitioners therein assert that a great miscarriage of justice has occurred by the issuance of the tax deeds and the State Court's upholding the same. Petitioners' Brief, at page 6, provides in the first unnumbered paragraph "...[t]he Complaint was amended by Stipulation in 1988, alleging payment of the

taxes...". Petitioners' Brief, at page 7, provides in part in the second unnumbered paragraph on said page that the State Court case granted summary judgment and dismissed the State Court Complaint on the ground that the statute of limitations had run to challenge a specific tax assessment, although no issue had ever been raised regarding any specific tax assessment...". Said Amended Complaint specifically alleges at paragraphs 16 and 17 (A-155), the issue of tax assessment as follows:

> **...16. The lands hereinabove described have been illegally assessed for the purposes of taxation for many years, including the year 1973 to date and taxes have been illegally levied, imposed and, in part, collected from the plaintiff thereon by the defendant in the aggregate amount on said assessments...(emphasis added).**
>
> **...17. That each time payment of the aforesaid taxes was tendered it was accompanied by notice that payment was being made under protest. Furthermore, the Village Clerk of the Village of Baldwinsville, New York, and the Commissioner of Finance of Onondaga County was otherwise notified of plaintiff Kahre-Richardes Family Foundation, Inc.'s tax exempt status.**

The Amended Complaint in State Court, in paragraph 16, clearly alleges that the Petitioners paid only "...part..." of the taxes. This paragraph cannot be reasonably interpreted to allege that Petitioners had paid all of the real estate taxes due on the property in question.

Secondly, Petitioners state in their Brief, at page 9-10, "...In the State Court proceeding, the issue of the payment has never been litigated...".

This statement is also incorrect. Paragraph numbered 16 of the Second Amended State Court Complaint (A-155) set forth in full above alleges that the property in question had "...been illegally assessed for the purposes of taxation..." (Emphasis added) and taxes were collected in part. The State Court held in its Decision (A-246-252) against Petitioners which provides in part at A-248-249 as follows:

> **...The Court presently has before it motions by Robroy, Susan Weichert and Robert Weichert for summary judgment dismissing the complaint and the replies and granting judgment under Section 1521 of the Real Property Actions and Proceedings Law declaring the validity of the claims of Robroy and Susan Weichert to the property. The motion is based on the recent decision in Kahal Bnei v. Fallsburg (78 NY2d 194) which held that an action by a religious corporation for judgment declaring invalid a 1987 real property tax assessment on the ground that the property is mandatorily exempt under Section 420-a of Real Property Tax Law was properly dismissed as time-barred, having been commenced more than four months after the 1987 assessment became final. The Kahal Court noted that the challenge to the assessment on the ground that the property was exempt was essentially a challenge to the taxing authority's jurisdiction over the subject property and thus could have been raised in a CPLR Article 78 proceeding. The Court therefore concluded that the limitations period applicable to such a proceeding governed the action regardless of the form in**

which the action was brought (see, Solnick v. Whalen, 49 NY2d 224, 229).

Here, according to the undisputed affidavit of Janet St. John, Village Clerk of the Village of Baldwinsville, the village assessments for the year 1975 to 1980 were final on January 1 of the year in question, i.e., the assessment for the year 1975 was final on January 1, 1975. No issue as to the Foundation's having received timely notice of the assessment is raised. The record contains no evidence of a timely challenge to the assessment which formed the basis for the tax deed in issue. The action herein was not commenced until April 3, 1980. Accordingly, the claim of the Foundation and Pritchard that the tax deed is invalid because the underlying assessment is invalid is time-barred and is unavailable to Pritchard in pursuing his complaint and to Pritchard and the Foundation in defense of the counterclaims under Article 15 of the Real Property Actions and Proceedings Law.

This Decision has been upheld by the New York State Appellate Division, Fourth Department (A-196-199) and the State Court of Appeals denied leave to review same (A-200-201).

Thirdly, Petitioners' Brief at page 4 at the second unnumbered paragraph provides:

...The Petitioners alleged that in every State Court proceeding, the public officials misrepresented payment of the taxes by Petitioners, either by concealing the fact of

payment, or by mischaracterizing the payment of the taxes on December 15, 1976 as payment of the 1976 taxes, rather than as a redemption of the 1975 tax sale certificate sold on February 16, 1976.

Petitioners erroneously claim throughout their Brief that the 1975 taxes had been paid.

Petitioners want this Court to believe that a $551.19 payment (A-90) which was for the 1976 taxes (A-89) also included the unpaid 1975 Village Taxes (A-88); and that somehow the prior attorneys for Petitioners never raised this issue during twelve (12) years of State litigation. The receipt at A-89 is entitled "Village of Baldwinsville Statement of Taxes, Tax of 1976", and provides the "total amount paid" of $551.19" is quite logically the payment of the Village 1976 taxes for the property in question (including water, sewer and interest and penalties); nothing more and nothing less. "A-89" does not in any way provide, say, or imply, that it is also a Statement of Taxes for the 1975 Village real estate taxes as set forth in A-88. The Affidavit of Donald Colon (A-298-301) who was Mayor of the Village of Baldwinsville from 1972 to 1981 and the Village Treasurer from 1982 to present, which Affidavit was given in support of the Villages' motion for summary judgment in the Court below provides in full in paragraphs 6 and 7 as follows:

6. On December 22, 1994, I gave a deposition to plaintiff's attorney, under oath, wherein I testified for approximately four (4) hours answering questions posed by plaintiffs' attorney. At said deposition, the Village Clerk for the Defendant, Village of Baldwinsville, and I produced all records in possession of the Village subpoenaed by plaintiffs' attorney.

7. The records for the Village of Baldwinsville show, as testified to by me at said deposition as follows relative to the property in question:

a. On or about March 1, 1975, plaintiffs were duly mailed a 1975 Statement of Taxes for the property in question showing the amount of $270.00 for the 1975 taxes, (Exhibit 8 of the Complaint, except the "received payment from" and "interest and penalties" sections would have been blank).

b. The plaintiffs did not, and at no time have they ever, paid said 1975 tax bill.

c. That at no time did the plaintiffs ever apply to the Village of Baldwinsville administratively for tax exemption status for said property.

d. On or about December 1975 after being duly published and noticed, a tax sale certificate for said property was offered for sale.

e. On or about February 16, 1976, Robroy Pools, Inc., by its president, the defendant herein, Robert Weichert, issued a check made payable to the Village of Baldwinsville in the amount of $303.25 and received the tax sale certificate for the property in question. Said check is Exhibit "7" of the Complaint.

f. On or about March 1, 1976, plaintiffs were duly mailed a 1976 Statement for Taxes

for the property in question showing the total 1976 taxes due in the amount of $517.59, (Exhibit "9" of the Complaint except the "received payment from" and "interest and penalties" would have been blank).

g. On or about December 15, 1976, the plaintiffs paid the 1976 taxes due and interest and penalties thereon in the amount of $551.59, Exhibit "10" of he Complaint.

h. That when the plaintiffs paid the 1976 taxes, as set forth above, they only paid the 1976 taxes, and plaintiffs did not pay the 1975 taxes.

i. That the Village, after receiving proof that a notice of redemption was served and the Five Dollar ($5.00) statutory fee, did issue a tax deed for said property to the defendant, Robroy Pools, Inc., on or about the 27th day of October, 1978, filed in the Onondaga County Clerk's Office May 31, 1979 in Book of Deeds 2719 at page 65, Exhibit "11" of the Complaint (A-91-94). The Village of Baldwinsville did otherwise comply with all then applicable laws before issuing tax deed.

Contrary to Petitioners' contention at pages 4 and 13 of their Brief, that payment was concealed and misrepresented by Respondents, Mr. Colon's Affidavit clearly shows Petitioners had access to all of the fiscal records of the Village and no Certificate of Redemption was issued for the year 1975 because Petitioners did not pay the 1975 taxes.

Petitioners continue to misrepresent that the payment for the 1976 taxes paid the 1975 Village taxes also even though the check and receipt match the amount due for only the 1976 taxes and deny that this issue was litigated in the State Courts. As appears from the Briefs of both the Petitioners and Respondents, before the New York State Appellate Division (A-318 and A-332, respectively), it is clear that the issue of the payment of the 1975 taxes was raised by Petitioner (A-322, 323) and disputed by Respondents (A-347, 348) and finally determined in favor of Susan M. Weichert, Respondent, by orders of the Appellate Division, Fourth Department dated and entered November 19, 1993 (A-197). Petitioners have no check or receipt showing payment for the 1975 taxes and that is because they did not pay the 1975 taxes. There has been no miscarriage of Justice in the State Courts here.

Furthermore, Petitioners' Brief is replete with erroneous and misleading statements too numerous to enumerate herein which are presented as statements of fact, but which have no basis in fact and are not supported anywhere in the record.

Respondents, respectfully submit herein that, for the reasons hereinbefore set forth, and for the reasons stated in the bench decision of the Federal District Court below (A-37-43), and the summary order of the United Statess Court of Appeals of the Second Circuit, the Petitioners' Federal action is barred by the doctrine of res judicata/collateral estoppel as the law applies in the State of New York.

Although Petitioners did not allege or claim violations of their state or federal civil and constitutional rights in the state actions, these are claims which could or should have been litigated in those actions but were not. There are no barriers in the New York State Courts to full and complete litigation of Petitioners' claims for civil rights and constitutional relief. Furthermore, it is clear from Petitioners' complaint that their claims of violations of their alleged civil and constitutional rights arise out of the exact same set of facts and circumstances as have already been fully litigated in the New York State Courts.

In this case, the New York Court had the power to grant Petitioners the relief sought in the present action in the Federal Courts. Therefore, Petitioners' issues and claims are precluded and summary judgment was appropriately granted. **Burgos v. Hopkins, 14 F.3rd 787 (2nd Cir. 1994); Williams v. Ward, 556 F.2d 1143, 1154 (2nd Cir., cert. dismissed, 434 US 944, continue 98 S. Ct. 469, 54 L. Ed. 2d 323) 1977).**

The Petitioners' claims, that the identity of the parties and issues in the State Court are not the same as in the Federal Court, are without merit. (*See decision of Judge Scullin relevant to the New York Law on the Doctrine of Res Judicata*, Appendix to the Petition, 2-4; 9-15).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Dated: August 23, 1996.

Respectfully Submitted,

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APPENDIX

Appendix A - September 29, 1995 Appellate Division Order (Appeal No. 1)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

PRESENT: PINE, J. P., WESLEY, CALLAHAN AND DAVIS, JJ.

KAHRE-RICHARDES FAMILY FOUNDATION, INC., AND THE PANAMERICAN-PANAFRICAN ASSOCIATION, INC., AS SUCCESSOR IN INTEREST TO THE PANAMERICAN ASSOCIATION FOR THE FESTIVAL OF THE NEW WORLD, INC., AND ROBERT S. PRITCHARD, HENRY G. POLGAR, ANTOINE J. POLGAR, AND KEVIN J. POWELL, INDIVIDUALLY AND AS RESIDENTS OF THE SUBJECT PROPERTY KNOWN AS "APPLECREST",

Appellants,

v.

VILLAGE OF BALDWINSVILLE, COUNTY OF ONONDAGA, ROB ROY POOLS, INC., AND SUSAN M. WEICHERT,

Respondents.

(APPEAL NO. 1.)

The above named Kahre-Richardes Family Foundation, Inc., and the Panamerican-Panafrican Association, Inc., as Successor in Interest to the Panamerican Association for the Festival of the New World, Inc., and Robert S. Pritchard, Henry G. Polgar, Antoine J. Polgar, and Kevin J. Powell, Individually and as Residents of the Subject Property Known as "Applecrest", having appealed to this Court from the Order of the Supreme Court, entered in the Onondaga County Clerk's Office on

August 3, 1994, and said appeal having been argued by Barbara Sims of counsel for appellants, John Engelbrecht of counsel for respondents, and due deliberation having been had thereon,

It is hereby ORDERED, That the Order so appealed from be and the same hereby is unanimously affirmed without costs, judgment is ordered imposing sanction and the matter remitted to Supreme Court for further proceedings in accordance with the following Memorandum that is hereby made a part hereof.

Entered: September 29, 1995. CARL. M. DARNALL, Clerk

Appendix B - Memorandum Decision of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department

1118. (Onondaga Co.)--
KAHRE-RICHARDES FAMILY FOUNDATION, INC., AND THE PANAMERICAN-PANAFRICAN ASSOCIATION, INC., AS SUCCESSOR IN INTEREST TO THE PANAMERICAN ASSOCIATION FOR THE FESTIVAL OF THE NEW WORLD, INC., AND ROBERT S. PRITCHARD, HENRY G. POLGAR, ANTOINE J. POLGAR, AND KEVIN J. POWELL, INDIVIDUALLY AND AS RESIDENTS OF THE SUBJECT PROPERTY KNOWN AS "APPLECREST", Appellants v. VILLAGE OF BALDWINSVILLE, COUNTY OF ONONDAGA, ROB ROY POOLS, INC., AND SUSAN M. WEICHERT, Respondents. (APPEAL NO. 1)----------
Order unanimously affirmed without costs, judgment ordered imposing sanction and matter remitted to Supreme Court for further proceedings in accordance with the following Memorandum: We affirm for reasons stated in the decision at Supreme Court (Stone, J.). We add only that these appeals are a continuing effort by plaintiffs' counsel "to delay or prolong the resolution of the litigation".(22 NYCRR 130-1.1 [c][2] and we therefore order that judgment be entered in accordance with 22 NYCRR 130-1.2 imposing a sanction against plaintiffs' counsel in the amount of $500.00. Further, we conclude that plaintiffs' counsel should compensate defendants for "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees" as a result of these appeals (22 NYCRR 130-1.1 [a]. Plaintiffs and their counsel have been given a reasonable opportunity to be heard in connection with defendants' request for sanctions against plaintiffs (see, 22 NYCRR 130-1.1 [d]. Therefore, we remit the matter to Supreme Court for a hearing to determine the "costs

in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees" (22 NYCRR 130-1.1[a] and for an order directing that judgment be entered therefor in accordance with 22 NYCRR subpart 130-1 (see Board of Educ. v. Allen, 192 AD2d 1099, 1100, appeal dismissed 82 NY2d 846). (Appeal from Order of Supreme Court, Onondaga County, Stone, J.-Summary Judgment.) PRESENT: PINE, J. P., WESLEY, CALLAHAN AND DAVIS, JJ. (Sept. 29, 1995.)

Appendix C - September 29, 1995 Appellate Division Order (Appeal No. 2)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

PRESENT: PINE, J.P., WESLEY, CALLAHAN AND DAVIS, JJ.

KAHRE-RICHARDES FAMILY FOUNDATION, INC., AND THE PANAMERICAN-PANAFRICAN ASSOCIATION, INC., AS SUCCESSOR IN INTEREST TO THE PANAMERICAN ASSOCIATION FOR THE FESTIVAL OF THE NEW WORLD, INC., AND ROBERT S. PRITCHARD, HENRY G. POLGAR, ANTOINE J. POLGAR, AND KEVIN J. POWELL, INDIVIDUALLY AND AS RESIDENTS OF THE SUBJECT PROPERTY KNOWN AS "APPLECREST",

Appellants,

v.

VILLAGE OF BALDWINSVILLE, COUNTY OF ONONDAGA, ROB ROY POOLS, INC., AND SUSAN M. WEICHERT,

Respondents.

(APPEAL NO. 2.)

The above named Kahre-Richardes Family Foundation, Inc., and the Panamerican-Panafrican Association, Inc., as Successor in Interest to the Panamerican Association for the Festival of the New World, Inc., and Robert S. Pritchard, Henry G. Polgar, Antoine J. Polgar, and Kevin J. Powell, Individually and as Residents of the Subject Property known as

"Applecrest", having appealed to this Court from the Order of the Supreme Court, entered in the Onondaga County Clerk's Office on November 3, 1994, and said appeal having been argued by Barbara Sims of counsel for appellants, John Engelbrecht of counsel for respondents, and due deliberation having been had thereon,

It is hereby ORDERED, That the Order so appealed from be and the same hereby is unanimously affirmed without costs, judgment is ordered imposing sanction and is remitted to Supreme Court for further proceedings in accordance with the same Memorandum as in Kahre-Richardes Family Foundation, v. Village of Baldwinsville ([appeal No. 1] __AD2d__ [decided Sept. 29, 1995]).

Entered: September 29, 1995. CARL M. DARNALL, Clerk

Appendix D - Memorandum Decision of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department

1119. (Onondaga Co.)--
KAHRE-RICHARDES FAMILY FOUNDATION, INC., AND THE PANAMERICAN-PANAFRICAN ASSOCIATION, INC., AS SUCCESSOR IN INTEREST TO THE PANAMERICAN ASSOCIATION FOR THE FESTIVAL OF THE NEW WORLD, INC., AND ROBERT S. PRITCHARD, HENRY G. POLGAR, ANTOINE J. POLGAR, AND KEVIN J. POWELL, INDIVIDUALLY AND AS RESIDENTS OF THE SUBJECT PROPERTY KNOWN AS "APPLECREST", Appellants v. VILLAGE OF BALDWINSVILLE, COUNTY OF ONONDAGA, ROB ROY POOLS, INC., AND SUSAN M. WEICHERT, Respondents. (APPEAL NO. 2)----------

Order unanimously affirmed without costs, judgment ordered imposing sanction and matter remitted to Supreme Court for further proceedings in accordance with same Memorandum as in Kahre-Richardes Family Foundation v. Village of Baldwinsville ([appeal No. 1] __AD2d__ [decided herewith]). (Appeal from Order of Supreme Court, Onondaga County, Stone, J. - Sanctions.) PRESENT: PINE, J.P., WESLEY, CALLAHAN AND DAVIS, JJ. (Sept. 29, 1995.)